

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

94-123

In re:

CHANNEL 41, INC.
Battle Creek, Michigan
Petition for Rulemaking
Regarding "Off-Network"
Provision of Section
73.658(k) of the
Commission's Rules

MMB File No. 870622A

HUBBARD BROADCASTING, INC.
Petition for Rulemaking
Requesting Amendment of
Section 73.658(k) of the
Commission's Rules to delete
the "Off-Network" Program
Restriction

MMB File No. 920117A

To: The Commission

SUPPLEMENTAL COMMENTS OF GROUP W

Westinghouse Broadcasting Company, Inc. ("Group W") submits the following supplemental comments in response to the Commission's Public Notice of April 12, 1994, requesting comment on the two above-referenced Petitions for repeal of the off-network restrictions of the Prime Time Access Rule, Section 73.658(k) of the Commission's rules.^{1/}

Group W was the original proponent of the Prime Time Access Rule (PTAR) and has been a strong PTAR advocate in

^{1/} In addition, the Commission's Public Notice requests comment concerning a Petition for Declaratory Ruling, filed by First Media Corporation (MMB File No. 900418A), contesting the constitutionality of the Prime Time Access Rule. Group W has responded fully to this petition. See Comments of Westinghouse Broadcasting Company, Inc., et al., filed August 17, 1990. Nothing further needs to be said at this time.

the various Commission proceedings addressing the rule since its adoption in 1970. While some aspects of the rule, the off-network restriction in particular, have been controversial, the basic PTAR principle and resulting high audience time made available for local station use has become a widely accepted structural component of the television industry. In an age when many government regulations are looked upon with suspicion, PTAR has been a true success story. In Group W's view, the initiation of formal proceedings to review PTAR generally is neither necessary nor appropriate at this time. The off-network restriction, however, is a very different situation which for the reasons explained below merits review.

In previous 1987 comments addressed to the Channel 41, Inc. Petition, Group W had opposed the institution of any formal proceeding concerning the ancillary off-network restriction due to the potential disruptive effect on the first-run television programming marketplace.^{2/} While Group W remains concerned in this respect, subsequent over-riding developments have caused Group W to alter its position. Specifically, we refer to the growth of the Fox Television Network as a fully competitive network, able to compete for the national television audience and affiliated stations on a par with the other three national television networks. In Group W's view, the basic competitive changes

^{2/} See Joint Comments in Response to Application for Review, filed by Westinghouse Broadcasting Company, Inc., et al., on July 21, 1987.

resulting from this sea change mandate the prompt initiation of proceedings to consider repeal of the off-network provision.

Under current network definitional and PTAR provisions, not only are Fox Network affiliates exempt from PTAR until such time as Fox regularly provides more than 15 hours per week of prime time programming (see Section 73.662(f)), but under Note 4 to Section 73.658(k), Fox affiliates will remain exempt from off-network requirements (insofar as programming then under contract is concerned) for three years after Fox passes the network definitional threshold. This extended exemption from off-network requirements, given the present competitive situation, results in serious competitive imbalances in many television markets.

Not only is the disparate treatment of similarly situated competitors in a market patently unfair, but the situation could become even more ludicrous in an environment of shifting affiliations in the market. With shifts in affiliation, as have already been announced in several markets, a network affiliated station now subject to off-network requirements can suddenly become exempt from off-network requirements upon becoming a Fox affiliate.

Conversely, another station in the market may suddenly become subject to off-network requirements upon becoming an affiliate of one of the other three networks. The crude transitional measures now built into the off-network

provision simply are not designed to deal with this phenomenon in a way which is fair to all involved stations.

More fundamentally, Fox could well continue to function as a fully competitive network without ever reaching the definition of a network for PTAR purposes. In that event, the continued application of off-network restrictions to some, but not all, affiliated stations in the marketplace would raise even more serious questions of fundamental fairness and even-handed treatment. In the present competition environment, affiliates of the ABC, CBS, NBC and Fox networks should be subject to the same limitations, or lack thereof, in those periods when network programming is not being carried.

When PTAR was originally adopted, the off-network restriction was included to ensure that the development of a competitive first-run program syndication industry was not hampered by the widespread availability and use of off-network product. The restriction was not an integral component of PTAR, but was fashioned more as an ancillary protective measure, the need for which would lessen over time.^{3/} In the two decades since this action was taken, a viable and maturing first-run program syndication industry has developed under the aegis of PTAR.

In Group W's view, these changed circumstances mandate a thorough review of the extent to which the off-network

^{3/} See Network Television Broadcasting, 23 FCC 2d 382, 395 (1970). Group W's original PTAR proposal did not include an off-network restriction.

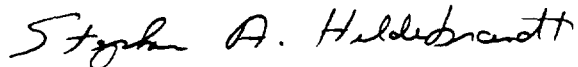
restriction has fulfilled its intended purpose and continues to be a necessary component of PTAR. The Commission should promptly institute formal rulemaking proceedings proposing to repeal the off-network restriction.

Respectfully submitted,

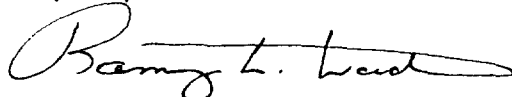
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June 14, 1994

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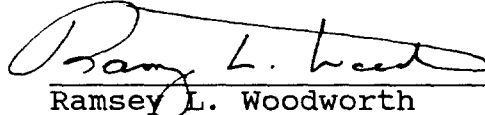
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